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SOFT No. 06-1164

In the Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals erred by addressing the timeliness of petitioner's complaint even though the government did not argue on appeal that the suit was barred by the six-year limitations period contained in 28 U.S.C. 2501.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 457 F.3d 1345. The opinion of the Court of Federal Claims (CFC) (Pet. App. 41a-126a) following a bench trial is reported at 62 Fed. Cl. 556. The opinion of the CFC on cross-motions for summary judgment is reported at 60 Fed. Cl. 230. The opinion of the CFC (Pet. App. 127a-154a) on the United States' motion for judgment on the pleadings or, in the alternative, for summary judgment is reported at 57 Fed. Cl. 182.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2006. A petition for rehearing was denied on November 30, 2006 (Pet. App. 155a-156a). The petition for a writ of certiorari was filed on February 26, 2007,

and was granted limited to Question 1 on May 29, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2501 of Title 28, United States Code, provides in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.

STATEMENT

Petitioner sued the United States, alleging that the government had physically taken petitioner's leasehold, without paying just compensation, during the remediation of a hazardous waste site pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.* The CFC dismissed a portion of petitioner's complaint, holding that it was barred by the six-year statute of limitations contained in 28 U.S.C. 2501. Pet. App. 127a-154a. After a bench trial on liability with respect to the remainder of petitioner's complaint, the CFC entered judgment for the United States. *Id.* at 41a-126a. The court of appeals vacated and remanded with instructions to dismiss, holding that the CFC lacked jurisdiction over the entirety of petitioner's suit because petitioner's claims had accrued more than six years before the complaint was filed. *Id.* at 1a-40a.

1. In 1969, petitioner entered into a 50-year lease that granted it the exclusive right to mine marketable sand and gravel on a 158-acre parcel of land (Site) in Lapeer County, Michigan. Pet. App. 2a-3a. The leased Site wholly included a pre-existing landfill that operated from 1955 until 1980. *Id.* at 3a-4a, 42a-43a. While it was in operation, the landfill illegally accepted drums of liq-

uid industrial waste and twice caught fire. *Id.* at 4a; C.A. App. 1796-1799, 1994, 2005, 2014, 2320.

Petitioner and the landfill's operator entered into a cooperative arrangement under which the operator notified petitioner when it located "good" sand or gravel in the course of expanding the landfill. Pet. App. 66a. Petitioner, in turn, conducted its mining operations slightly ahead of the growing landfill, leaving empty space that could be filled with garbage. *Ibid.* On at least two occasions, petitioner's president observed trucks dumping barrels into the landfill. *Id.* at 67a-69a.

In 1984, the United States Environmental Protection Agency (EPA) put the landfill on the National Priorities List pursuant to CERCLA because of the large number of buried drums containing hazardous materials. Pet. App. 4a. Two years later, EPA decided on its initial remedy for excavating and removing the contaminated drums at the Site. *Ibid.* In 1990, EPA decided on a remedy for the groundwater contamination and capping of the landfill. *Id.* at 4a-5a. During the winter of 1992-1993, in connection with the 1990 decision, EPA erected a chain link fence that enclosed approximately 60% of the Site. *Id.* at 5a. In February 1994, EPA constructed a new internal security fence that "encompassed the overwhelming portion of [petitioner's] leasehold interest." *Id.* at 5a-6a. Over the following years, EPA repeatedly moved the fence as required for remedial operations. *Id.* at 6a-7a.

In May 1998, the fence was again realigned, enclosing the Area of Institutional Controls (AIC), an area designed to protect individuals from future exposures to hazardous materials and to ensure the integrity of the landfill cap system. Pet. App. 6a; C.A. App. 3106. The May 1998 fence remained in place throughout the con-

struction of the landfill cap. *Id.* at 1427. In December 2003, EPA moved the fence inward to enclose a smaller area, which currently comprises the AIC and includes the landfill cap system. Pet. App. 90a.

During the relevant period, petitioner repeatedly interfered with EPA's remediation activities at the Site. See Pet. App. 6a; C.A. App. 1499-1511, 3574-3582. In addition, from 1992-1994, petitioner's counsel wrote a series of letters asserting petitioner's property rights and entitlement to just compensation. Pet. App. 6a. As a result of continuing disputes between petitioner and EPA, EPA issued an administrative order in December 1996 requiring petitioner to cooperate with EPA and not to mine within the AIC. *Ibid.* Disputes nonetheless continued regarding petitioner's compliance with the administrative order. The United States eventually initiated proceedings in United States District Court and obtained an injunction preventing petitioner from interfering with EPA's remedial efforts. *Ibid.*

2. In May 2002, petitioner filed suit in the CFC, alleging a taking of its leasehold and seeking just compensation. Pet. App. 7a. Petitioner alleged "that the EPA's construction of the landfill cap, occupation of the AIC, construction of fences and access roads, and installation of groundwater monitoring wells amounted to a permanent physical taking." *Ibid.* The government moved for judgment on the pleadings or, in the alternative, for summary judgment. See *id.* at 127a. The government argued that petitioner's suit was barred by 28 U.S.C. 2501, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within

six years after such claim first accrues."[1] The United States contended that petitioner's claim had accrued during the winter of 1992-1993 when EPA had erected fences that precluded petitioner's access to portions of the property, and that the 2002 complaint was therefore untimely. Pet. App. 5a, 133a.

The CFC granted the government's motion in part and denied it in part. Pet. App. 127a-154a. The CFC concluded that petitioner's takings claim had accrued on the "date on which [petitioner's] property 'ha[d] been clearly and permanently taken,'" and that the government had "failed to demonstrate that it 'destroyed' [petitioner's] right to possess, use, or dispose of the [Site] or the [AIC] upon construction of fences in the winter of 1992-1993." *Id.* at 136a, 141a-142a (quoting *Hornback* v. *United States*, 52 Fed. Cl. 374, 377, aff'd, 55 Fed. Appx. 536 (Fed. Cir. 2002)). The CFC held, however, that petitioner's claim with respect to areas covered by permanently installed monitoring wells that had not been abandoned was time-barred. *Id.* at 143a.

The parties then filed cross-motions for summary judgment. The government argued that, under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), it had not taken any Fifth Amendment property interest of petitioner because petitioner's mining in the AIC was barred by pre-existing background principles of state

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[1] Section 2501 contains an exception to the six-year filing requirement for claims filed by "person[s] under legal disability or beyond the seas at the time the claim accrues." 28 U.S.C. 2501. In such cases, suit may be filed "within three years after the disability ceases." *Ibid.* That exception is not implicated here. Section 2501 also establishes special timing rules for claims under 28 U.S.C. 1497 and for suits for the fees of officers of the United States. Those rules are likewise inapplicable to this case.

nuisance and property law. The CFC "agreed with the government's contention that background principles of Michigan nuisance and property law limit the scope of compensable property interests in a physical takings case such as [petitioner's]," Pet. App. 9a, but it found the record as to the applicable "background principles" insufficient to grant the government's motion for summary judgment, see *id.* at 9a-10a.

Shortly before trial, the CFC ordered the parties to file briefs regarding the accrual date of petitioner's claim. Based on the evidentiary record that had been developed up to that point, the government took the position that petitioner's cause of action had accrued in May 1998. See J.A. 37a-39a.

The CFC then held a bench trial on liability. After that trial, the CFC entered judgment for the government. Pet. App. 41a-126a. The CFC concluded that petitioner's takings claim had accrued in May 1998, and that the claims that then remained were therefore timely. *Id.* at 50a-52a. The CFC held that petitioner was not entitled to compensation, however, because it had acquired its lease "[s]ubject to the [l]andfill," see *id.* at 63a, and had effectively consented to any restriction on its leasehold resulting from the landfill's operations, *id.* at 63a-73a. The CFC explained that petitioner's "contribution to the creation of a landfill containing a hazardous waste site makes the loss of a portion of [petitioner's] property during the remediation of that site a burden which it is fair to allow [petitioner] to bear, rather than shifting [petitioner's] loss to the public as a whole." *Id.* at 72a-73a. As an additional ground for its decision, the CFC also held that petitioner's mining was prohibited by background principles of state nuisance and property law. *Id.* at 73a-113a.

4. The court of appeals vacated and remanded with instructions to dismiss petitioner's complaint as untimely. Pet. App. 1a-40a.

a. Although the government did not argue in the court of appeals that petitioner's complaint was time-barred, an amicus curiae raised the issue, and petitioner addressed the timeliness of the complaint in its reply brief. See Pet. App. 13a-14a. The court of appeals held that it was required to address the timeliness of petitioner's complaint because 28 U.S.C. 2501 limits the jurisdiction of the CFC. See Pet. App. 15a-19a. The court acknowledged and distinguished recent decisions of this Court that have held other timing requirements to be non-jurisdictional in character. See *id.* at 17a-18a. The court explained that, "[i]n contrast to a non-jurisdictional claim-processing rule or the statute of limitations in [*Day* v. *McDonough*, 547 U.S. 198 (2006)], section 2501 sets forth a condition that must be met for a waiver of sovereign immunity in a suit for money damages against the United States." *Id.* at 17a-18a. The court also observed that

> the six-year statute of limitations of section 2501 enjoys a longstanding pedigree as a jurisdictional requirement. Since 1883 when the [Supreme] Court first held that the statute of limitations was jurisdictional in *Kendall v. United States*, 107 U.S. 123 (1883), the Court has consistently maintained that the time limit is jurisdictional and therefore cannot be waived.

Id. at 18a (citations omitted).

b. The court of appeals held that petitioner's claim accrued no later than February 1994 and that petitioner's complaint was therefore untimely. Pet. App.

23a-28a. The court stated that the fence EPA erected in 1994 "destroyed [petitioner's] right to exclude others from its leasehold" and "inhibited [petitioner's] right to use its property free of interference." *Id.* at 24a. The court further explained that the fence had remained on the Site from that time forward, even though the fence's precise location was changed from time to time. *Id.* at 24a-25a.

c. Judge Newman dissented. Pet. App. 33a-34a. She would have held that the limitations period established by Section 2501 "is not itself a matter of jurisdiction," *id.* at 33a, and that the timeliness of petitioner's complaint therefore "need not be considered *sua sponte*" when the government did not raise it on appeal, *id.* at 38a. Judge Newman further stated that she "would affirm the holding of the [CFC] that the limitations period had not accrued in 1994, and would reach the merits of the takings claim." *Id.* at 39a. On the merits, she would have affirmed the CFC's judgment on the ground that petitioner was not entitled to compensation because it was aware of the landfill when it acquired its leasehold. *Id.* at 40a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that the six-year filing requirement established by Section 2501 is a nonwaivable jurisdictional limitation on the authority of the CFC to enter a money judgment against the United States.

A. Since 1863, when Congress first authorized the Court of Claims (now the CFC) to enter money judgments against the United States, the governing statute has always provided that a plaintiff's claim is "barred" if it is not asserted within six years after it accrues.

This Court has repeatedly stated that, unlike statutes of limitations governing suits between private parties, which are ordinarily deemed waived if defendants fail to invoke them in a timely fashion, the six-year filing requirement establishes a non-waivable jurisdictional limitation on the authority of the Court of Claims. Against the backdrop of those decisions, Congress has periodically refined, reenacted, and recodified the six-year filing requirement without evincing any intent to permit waiver of that requirement or otherwise to alter its jurisdictional character. This Court's settled construction of the statutory bar, and Congress's apparent concurrence in that construction, provide strong reasons to reject petitioner's argument here.

B. The result required by repeated decisions of this Court is reinforced by a number of sound reasons for construing Section 2501's six-year filing requirement as non-waivable and jurisdictional. That reading is consistent with the established principle that, in a suit against the United States, the terms of the government's consent define the jurisdiction of the court. It is also consistent with the history of the Court of Claims' creation as an Article I tribunal whose core function is to implement Congress's determinations regarding how federal funds should be expended. And unlike most statutes of limitations, which are tied to particular causes of actions or classes of claims and are potentially applicable in the courts of other sovereigns, Section 2501 by its terms governs proceedings (regardless of the cause of action asserted) only in federal court—and, indeed, only in a particular federal court.

C. Petitioner's reliance on the text of current Section 2501 is misplaced. Because the language of the current provision is not meaningfully different from prior ver-

sions of the six-year filing requirement, which this Court has consistently construed as non-waivable and jurisdictional, petitioner's textual argument provides no sound basis for departing from this Court's prior decisions. Section 2501 states, with narrow exceptions not relevant here, that "[e]very" claim filed in the CFC is barred if it is not asserted within six years after it accrues. Petitioner's reliance on a background understanding in other contexts that statutes of limitations are waivable is misplaced, since this Court's decisions have established a different background understanding of the statutory time limit for filing suit against the United States in the CFC for money damages.

D. Petitioner's reliance on the structure of Title 28 —and, in particular, on the fact that Section 2501 is codified in a different chapter of Title 28 from the one that contains the provisions (such as 28 U.S.C. 1491) that identify the substantive claims the CFC is authorized to hear—is misplaced. The 1948 Act that revised the Judicial Code expressly stated that no inference regarding the meaning of various provisions should be drawn from their placement within Title 28. The fact that Section 2501 is codified separately from other, indisputably jurisdictional provisions also does not distinguish it from its statutory predecessors, which this Court has construed as jurisdictional. Similarly in *Bowles* v. *Russell*, 127 S. Ct. 2360 (2007), this Court construed the time limit for filing a notice of appeal in a federal civil case as jurisdictional, even though it is codified in a different chapter of Title 28 from the one that contains the provisions that in terms define the "jurisdiction" of the courts of appeals.

E. The more recent decisions of this Court on which petitioner relies do not undermine the Court's long-

standing construction of Section 2501 and its predecessors. Those recent decisions have held that, in certain instances or respects, time limits for filing suit against the United States should be applied in the same manner as comparable time limits in disputes between private parties. The Court has not overruled any of its precedents, however, nor has it addressed the specific question whether compliance with Section 2501's six-year filing requirement may be waived by the government. Even if the recent decisions on which petitioner relies are understood to establish a presumption that statutory time limits for suing the government are subject to waiver, that presumption is rebutted here, since this Court has repeatedly construed Section 2501 and its predecessors as non-waivable and jurisdictional, and Congress has acquiesced in that construction.

ARGUMENT

SECTION 2501's BAR TO CLAIMS FILED MORE THAN SIX YEARS AFTER THEIR ACCRUAL ESTABLISHES A NON-WAIVABLE JURISDICTIONAL LIMIT ON THE AUTHORITY OF THE COURT OF FEDERAL CLAIMS TO ENTER A MONEY JUDGMENT AGAINST THE UNITED STATES

The court of appeals held that petitioner's claim had accrued no later than February 1994. See Pet. App. 23a. Although petitioner sought review of that holding, this Court's grant of certiorari was limited to the question whether Section 2501 imposes a jurisdictional limit on the CFC's authority, and the accrual date of February 1994 must therefore be taken as given for purposes of the proceedings in this Court.[2] Petitioner's complaint

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[2] Despite this Court's denial of certiorari on the question of when petitioner's takings claim accrued, Amicus Curiae National Association

was filed in May 2002, more than six years after the date of accrual as determined by the court of appeals, and is

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of Home Builders (NAHB) asserts (Br. 3) that the claim did not become ripe until petitioner sought compensation under the Tucker Act, and that "the statute of limitations could not have run prior to the time the physical takings claim became ripe." *Ibid.* NAHB acknowledges the oddity of that result, *id.* at 3, 6, which, in its view, would mean that no statute of limitations would apply in a case such as this despite the explicit text of 28 U.S.C. 2501. NAHB nevertheless maintains that this result is compelled by *Williamson County Regional Planning Commission* v. *Hamilton Bank*, 473 U.S. 172, 195 (1985) (*Williamson County*), and it therefore asks the Court to reconsider its decision in *Williamson County*. See Amicus Br. 11-17.

The issue raised by NAHB is not fairly included in the question on which certiorari was granted, however, and it was neither presented to nor decided by the CFC or the Federal Circuit. In any event, the language in *Williamson County* on which NAHB relies simply makes clear that *equitable relief* against the United States to enjoin allegedly unconstitutional action—a taking of property without compensation—is not available if an action for just compensation may be brought under the Tucker Act. See 473 U.S. at 194-195 ("If the government has provided an adequate process for obtaining compensation, and if resort to that process yields just compensation, then the property owner has no claim against the Government for a taking.") (internal quotation marks, alterations, and citation omitted); *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984) ("Equitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking.") (footnote omitted). Where such a suit is available, any taking is not "without just compensation" and therefore is constitutional. By virtue of Section 2501, any such action to obtain compensation under the Tucker Act must be brought within six years of the alleged taking. Of course, if the plaintiff seeks compensation under the Tucker Act and loses on untimeliness grounds or on the merits of the takings issue (*e.g.*, based on a determination that there has been no taking that would trigger the Fifth Amendment's compensation condition), the plaintiff could not relitigate the takings issues in a subsequent suit for equitable relief.

therefore "barred" by Section 2501. Relying on a long line of this Court's precedents, see Pet. App. 18a-19a, the Federal Circuit correctly held that Section 2501 establishes a jurisdictional limit on the CFC's authority, and that dismissal of petitioner's suit was therefore required notwithstanding the government's failure to renew its timeliness challenge on appeal. The judgment of the court of appeals should be affirmed.

A. This Court Has Repeatedly Construed Section 2501 And Its Statutory Predecessors As Imposing A Non-Waivable Jurisdictional Restriction On The Authority Of The CFC

1. When Congress first established the Court of Claims in 1855, that court was not empowered to enter binding judgments. Rather, the court was authorized only to hear claims, to report its findings to Congress, and to provide a draft of a private bill in cases where the court's decision was favorable to the claimant. See Act of Feb. 24, 1855, ch. 122, § 7, 10 Stat. 613; *United States* v. *Mitchell*, 463 U.S. 206, 212-213 (1983). In 1863, when Congress vested the Court of Claims with statutory authority to enter binding judgments, Congress also provided "[t]hat every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition setting forth a statement of the claim be filed in the court or transmitted to it under the provisions of th[e] act within six years after the claim first accrues." Act of Mar. 3, 1863 (1863 Act), ch. 92, § 10, 12 Stat. 767 (Rev. Stat. § 1069 (1878)). In holding that the 1863 Act did not violate the Seventh Amendment, this Court recognized the unique nature of suits against the United States. Noting that "[t]he government cannot be sued, except with its own consent," this Court held that the government "can declare in what court it may be

sued, and prescribe the forms of pleading and the rules of practice to be observed in such suits. It may restrict the jurisdiction of the court to a consideration of only certain classes of claims against the United States." *McElrath* v. *United States*, 102 U.S. 426, 440 (1880).

Shortly thereafter, this Court reiterated that the government "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and it recognized that Congress had enacted "restrictions which that court may not disregard." *Kendall* v. *United States*, 107 U.S. 123, 125 (1883). "For instance," the Court continued, "where it appears in the case that the claim is not one for which, consistently with the statute, a judgment can be given against the United States, it is the duty of the court to raise the question whether it is done by plea or not." *Ibid.* The Court explained that, under the 1863 Act, the class of cases in which judgment cannot be entered against the United States includes those "declared barred if not asserted within the time limited by the statute." *Ibid.* In answer to the question of what claims are barred, the Court stated: "*Every* claim—except those specially enumerated—is forever barred unless asserted within six years from the time it first accrued." *Ibid.* The Court therefore refused to add to the list of disabilities specified in the statute to which the six-year bar would not apply. *Ibid.*; see 1863 Act § 10, 12 Stat. 767; pp. 37-38 & n.11, *infra*.[3]

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[3] In *United States* v. *Lippitt*, 100 U.S. 663 (1879), this Court considered the application of Rev. Stat. § 1069 (1878) (the codification of the 1863 Act's six-year bar) to a claim that was first presented to the War Department and was thereafter transmitted by that Department to the Court of Claims pursuant to new statutory procedures enacted in 1868. See 100 U.S. at 666-667. The Court held that the six-year filing requirement was satisfied so long as the claim was presented to the

In *Finn* v. *United States*, 123 U.S. 227 (1887), this Court reaffirmed and expanded upon its prior conclusion that non-compliance with the six-year filing period specified in the 1863 Act must be noticed by the Court of Claims whether or not the government seeks dismissal on that ground:

> The general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions, has no application to suits in the Court of Claims against the United States. An individual may waive such a defence, either expressly or by failing to plead the statute; but the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims.

Id. at 232-233. The Court explained that, when a suit was filed in the Court of Claims more than six years after the plaintiff's cause of action had accrued,

> [t]he duty of the court, * * * whether limitation was pleaded or not, was to dismiss the petition; for the statute, in our opinion, makes it a condition or

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War Department within six years after its accrual, regardless of the date on which it was transmitted by that Department to the Court of Claims. See *id.* at 668. The Court also stated that "[w]hether if a claim be presented at the proper department when six years has elapsed after it first accrued, the government is at liberty, upon its transfer therefrom to the Court of Claims, to plead the limitation of six years, or whether the court, in such cases, must itself interpose the statute for the protection of the government, are questions not necessary to be decided in this case." *Id.* at 669. The Court subsequently resolved those questions in *Finn* v. *United States*, 123 U.S. 227 (1887). See pp. 15-16 & note 4, *infra*.

> qualification of the right to a judgment against the United States that—except where the claimant labors under some one of the disabilities specified in the statute—the claim must be put in suit by the voluntary action of the claimant * * * within six years after suit could be commenced thereon against the Government.

Id. at 232.[4]

In 1887, Congress enacted the Tucker Act, ch. 359, 24 Stat. 505, which extended the jurisdiction of the Court of Claims to additional types of cases and granted the district courts concurrent jurisdiction in cases involving specified amounts in controversy. Section 1 of the Tucker Act stated that "the Court of Claims shall have jurisdiction to hear and determine the following matters: * * * *Provided*, That no suit against the Government of the United States[] shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is

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[4] Petitioner suggests (Br. 31) that the statements in *Finn* quoted in the text did not address the application of Section 2501's predecessor. That is incorrect. Although the claim in *Finn* was referred to the Court of Claims by the Secretary of the Treasury, see 123 U.S. at 228, the relevant time bar was imposed by Rev. Stat. § 1069 (1878), the codification of the 1863 Act's six-year bar. The Court explained that, in light of the claimant's non-compliance with the six-year filing requirement, "this claim belonged to the class which, under the express words of the act of 1863, Rev. Stat. § 1069 (1878), were 'forever barred,' so far, at least, as the claimant had the right to a judgment in that court against the United States." 123 U.S. at 232. By applying Rev. Stat. § 1069 (1878) to a claim that was transmitted to the Court of Claims by an Executive Branch agency, and by stating that the court in such a case was required to dismiss an untimely petition whether or not the government had raised the point, the Court in *Finn* resolved the questions left open in *Lippitt*, 100 U.S. at 669. See note 3, *supra*.

made." § 1, 24 Stat. 505. Thus, the Tucker Act imposed the same six-year filing requirement as did prior law, and the timing requirement was contained in the same section of the statute that conferred jurisdiction on the Court of Claims.[5]

After the Tucker Act's enactment, this Court continued to apply the time bar in the 1863 Act and to treat the six-year filing requirement as a non-waivable jurisdictional constraint on the Court of Claims' authority. Thus, in *de Arnaud* v. *United States*, 151 U.S. 483 (1894), the Court affirmed the dismissal of a claim that had accrued in 1862 but had not been submitted to the Treasury Department until 1886. See *id.* at 489, 492-495. The Court held that the claim was barred by the six-year filing requirement imposed by Rev. Stat. § 1069 (1878), and it quoted at length from its prior decision in *Finn*, explaining that the six-year bar applied whether the government had raised the point or not. See 151 U.S. at 495-496 (quoting *Finn*, 123 U.S. at 232-233); accord *United States* v. *New York*, 160 U.S. 598, 616-619 (1896). Similarly in *United States* v. *Wardwell*, 172 U.S. 48, 52 (1898), the Court reaffirmed that the six-year filing requirement imposed by Rev. Stat. § 1069 (1878) was "not merely a statute of limitations but also jurisdic-

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[5] The Tucker Act repealed "all laws and parts of laws inconsistent with th[e] act." § 16, 24 Stat. 508. In construing that provision, this Court explained that "repeals by implication are not favored, and when two statutes cover in whole or in part the same matter, and are not absolutely irreconcilable, effect should be given, if possible to both of them." *United States* v. *Greathouse*, 166 U.S. 601, 605 (1897). The Court held on that basis that, even though the Tucker Act itself did not include any exceptions to the six-year time limitation, the list of disabilities in the 1863 Act to which the six-year bar did not apply remained in force. *Id.* at 605-606.

tional in its nature, and limiting the cases of which the Court of Claims can take cognizance."

In 1911, Congress passed an act to codify, revise, and amend the laws relating to the judiciary. Act of Mar. 3, 1911, ch. 231, 36 Stat. 1087 (1911 Act). In that statute, Congress maintained the requirement that "[e]very claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * * within six years after the claim first accrues." § 156, 36 Stat. 1139. The Senate Report accompanying the 1911 Act stated that the six-year filing requirement contained in the new enactment reflected "[e]xisting law" and that "no change whatever" was intended. S. Rep. No. 388, 61st Cong., 2d Sess. 61 (1910). In *Munro* v. *United States*, 303 U.S. 36 (1938), this Court dismissed as untimely a suit filed in district court, under a 1930 statute that incorporated Tucker Act procedures (see *id.* at 38 n.1), notwithstanding the fact that the government had failed in its answer to invoke the six-year bar imposed by the 1930 law. Citing *Finn*, the Court held that "[t]he District Attorney had no power to waive conditions or limitations imposed by statute in respect of suits against the United States." *Id.* at 41.

In 1948, Congress revised the Judicial Code, using the 1911 code as the source material. H.R. Rep. No. 308, 80th Cong., 1st Sess. 1 (1947). Section 2501 of the Act of June 25, 1948, provided: "Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues." 62 Stat. 976. In construing Section 2501, the Court reaffirmed the jurisdictional character of the six-year filing requirement. Thus, in

Soriano v. *United States*, 352 U.S. 270 (1957), the Court explained:

> It has been settled since *Kendall* v. *United States*, 107 U.S. 123 (1883), that the Congress in creating the Court of Claims restricted that court's jurisdiction. In *Kendall* this Court held that the Congress in the Act creating the Court of Claims gave the Government's consent to be sued therein only in certain classes of claims and that no others might be asserted against it, including "claims which are declared barred if not asserted within the time limited by the statute." *Id.*, at 125. As to the latter cases, jurisdiction was given only over those filed "within six years after such claim *first* accrues," unless the claimant was "under legal disability or beyond the seas at the time the claim accrues," in which event suit must "be filed within three years after the disability ceases." 62 Stat. 976, 28 U.S.C. § 2501.

Id. at 273.

2. Thus, over an extended period of time beginning more than 125 years ago, this Court has repeatedly described the six-year filing requirement contained in Section 2501 and its statutory predecessors as a "jurisdictional" limit on the authority of the Court of Claims (now the CFC), and has repeatedly stated that the Court of Claims is required to dismiss an untimely complaint even if the government does not seek dismissal on that ground. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989).

The fact that Congress has periodically recodified the relevant statutory provision, and has refined its language in other respects without evincing any intent to permit waiver of the six-year filing requirement or otherwise to alter its jurisdictional character, provides a further reason to adhere to this Court's prior construction of the law. Compare, *e.g.*, *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 176, 179-180 (2005); *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Cannon* v. *University of Chicago*, 441 U.S. 677, 696-699 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978).

In *Cannon*, the Court applied that interpretive principle to a federal statute enacted in 1972, shortly after this Court had issued a series of decisions recognizing implied private rights of action under various federal laws. See 441 U.S. at 698 & nn.22-23. While acknowledging that its intervening decision in *Cort* v. *Ash*, 422 U.S. 66 (1975), had announced a more restrictive view of the circumstances under which a private right of action may be inferred, the Court in *Cannon* noted that its "evaluation of congressional action in 1972 must take into account its contemporary legal context." 441 U.S. at 698-699. Here, the pattern of this Court's decisions is longer and more consistent than in *Cannon*, and thus it would be particularly anachronistic to construe current Section 2501 solely by reference to recent decisions involving different statutory regimes. The inquiry must be based on the legal context, including most significantly this Court's repeated pronouncements concerning the non-waivable and jurisdictional character of Section 2501 and its predecessors, in which Congress has refined, reenacted, and recodified the longstanding statutory directive that suits in the Court of Claims (or the

CFC) are "barred" if not filed within six years after the plaintiff's claim accrues.

3. Petitioner dismisses the above-quoted language from *Kendall* and its progeny (see pp. 14-19, *supra*) as "[u]nfortunate dicta." Pet. Br. 30; see *id.* at 30-32. This Court's early discussions of Section 2501's statutory predecessors, however, did not reflect the "less than meticulous" use of the term "jurisdiction" that the Court's more recent opinions have warned against. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004); see *Eberhart* v. *United States*, 546 U.S. 12, 16 (2005) (per curiam). To the contrary, the Court in those early cases squarely confronted, and unequivocally endorsed, the most significant consequence of viewing the six-year filing deadline as "jurisdictional"—*viz.*, that the Court of Claims and this Court were precluded from awarding relief on an untimely claim even if the government did not seek dismissal on that ground. See *Kendall*, 107 U.S. at 125; *Finn*, 123 U.S. at 232-233; *de Arnaud*, 151 U.S. at 495-496.[6]

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[6] In arguing (Br. 31) that "the supposed jurisdictional edifice for the predecessor statute to § 2501 was grounded on dicta," petitioner relies in part on the fact that, in prior cases involving the 1863 Act, the government in fact raised the six-year bar as a ground for dismissal. The Court's evident intent in discussing the non-waivable, jurisdictional character of Section 2501's predecessors, however, and in contrasting that bar with waivable limitations period in suits between private parties, was to provide guidance to litigants and to the Court of Claims concerning the proper conduct of litigation in that court. In refining the applicable jurisdictional scheme, Congress was entitled to rely on this Court's repeated pronouncements that the Court of Claims was required to notice the six-year bar, and was disabled from awarding a money judgment on an untimely claim, even if the government did not seek dismissal on that ground. Congress should not be required to parse this Court's opinions to discern possible alternative grounds for

There is also no basis for petitioner's contention (Br. 30) that this Court, in construing Section 2501's predecessors, "neglected the ubiquitous legal understanding of a statute of limitations as a waivable affirmative defense." To the contrary, the Court acknowledged that general principle but found it to be inapplicable to the specific statutory provisions that defined the authority of the Court of Claims. Thus, in *Finn*, this Court noted "[t]he general rule that limitation does not operate by its own force as a bar, but is a defence, and that the party making such a defence must plead the statute if he wishes the benefit of its provisions." 123 U.S. at 232-233. The Court explained, however, that that rule "has no application to suits in the Court of Claims against the United States" because "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims." *Id.* at 233; see *de Arnaud*, 151 U.S. at 495-496 (quoting *Finn*, 123 U.S. at 233); *United States* v. *New York*, 160 U.S. at 617 (same); p. 15, *supra*. This Court's conscious treatment of Section 2501's predecessor as an exception to the usual rule that limitations periods establish waivable defenses cannot reasonably be impugned as "neglect[ing]" the general rule.

B. There Are Sound Reasons For Treating Section 2501 As An Exception To The General Rule That Limitations Periods For Commencing Suit Are Non-Jurisdictional

As explained above, the substantial body of this Court's precedents is by itself a sufficient basis for rejecting petitioner's reliance on the general rule that

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the Court's judgments before treating the Court's considered explication of existing law as authoritative.

statutes of limitations are non-jurisdictional. In addition, however, there are sound bases for construing the six-year filing requirement in Section 2501 as a non-waivable jurisdictional limit on the CFC's authority to enter money judgments against the United States.

1. As this Court has repeatedly recognized, "[t]he basic rule of federal sovereign immunity is that the United States cannot be sued at all without the consent of Congress." *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273, 287 (1983); see *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *Mitchell*, 463 U.S. at 212; *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). Thus, "the existence of consent [to be sued] is a prerequisite for jurisdiction," *Mitchell*, 463 U.S. at 212, and "the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit," *Sherwood*, 312 U.S. at 586. "A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms." *United States* v. *Dalm*, 494 U.S. 596, 608 (1990); see *Block*, 461 U.S. at 287 ("When waiver legislation contains a statute of limitations, the limitations provision constitutes a condition on the waiver of sovereign immunity."); accord *United States* v. *Mottaz*, 476 U.S. 834, 843 (1986) ("The limitations period is a central condition of the consent given by the Act.").

As the Court explained in *Dalm*, a plaintiff who files suit against the United States after the prescribed statutory period has elapsed effectively "asks [the court] to go beyond the authority Congress has given [it] in permitting suits against the Government." 494 U.S. at 610. This Court's uniform treatment of the applicable six-year filing requirement as a limitation on the Court of

Claims' *power* is thus consistent with established principles of sovereign immunity.[7]

2. When Congress first established the Court of Claims in 1855, the court did not have authority to enter binding judgments. Rather, "[t]he 1855 Act empowered that court to hear claims and report its findings to Congress and to submit a draft of a private bill in each case which received a favorable decision." *Mitchell*, 463 U.S. at 213; see p. 13, *supra*. The Court of Claims thus initially performed an advisory function, providing recommendations to Congress with respect to the proper disposition of requests for private bills.

After "[t]he limited powers initially conferred upon the [Court of Claims] failed to relieve Congress from the

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[7] Petitioner contends (Br. 43) that the interpretive principles that generally govern waivers of sovereign immunity are inapplicable here because the Constitution itself confers a right to monetary compensation for a taking of property by the United States. The Fifth Amendment's Just Compensation Clause, however, does not itself override the United States' sovereign immunity from suits for damages to be paid out of the federal treasury. That immunity can be waived only by Act of Congress. See *Lynch* v. *United States*, 292 U.S. 571, 581-582 (1934); U.S. Const. Art. I, § 9, Cl. 7. In any event, neither the text nor the history of Section 2501 suggests that its character as jurisdictional or nonjurisdictional could vary from case to case depending on the substantive claim asserted. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 380-385 (2005). And even assuming, arguendo, that Congress is constitutionally required to provide a compensation mechanism for takings claims, Congress has broad discretion to fashion an appropriate jurisdictional and procedural scheme for the resolution of such suits. Petitioner does not and could not reasonably contend, for example, that it can pursue its takings claim in the district court rather than in the CFC. Nor could treatment of Section 2501's six-year filing requirement as a jurisdictional limit on the CFC's authority reasonably be thought to place an unconstitutional burden on petitioner's asserted Fifth Amendment right to just compensation.

laborious necessity of examining the merits of private bills," Congress amended the statutory scheme to vest the court with authority to enter binding judgments. *Mitchell*, 463 U.S. at 213 (citation and internal quotation marks omitted). Congress conferred that authority, however, subject to specific conditions set by statute, including the requirement that a claim be filed within six years of its first accrual. The CFC is an Article I court, see 28 U.S.C. 171(a), and, as a matter of both history and current practice, its core function is to implement Congress's determinations as to how federal funds will be spent. See U.S. Const. Art. I, § 8, Cl. 1 ("The Congress shall have Power * * * to pay the Debts * * * of the United States."); *United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397-401 (1980).

Congress's refusal to authorize the CFC to enter binding judgments on untimely claims, even where Executive Branch officials do not rely on the six-year bar, is simply one means by which Congress has sought to maintain adequate control over the public fisc. See *Finn*, 123 U.S. at 233 (explaining that "the Government has not expressly or by implication conferred authority upon any of its officers to waive the limitation imposed by statute upon suits against the United States in the Court of Claims"). Indeed, the Appropriations Clause of the Constitution provides that no money may be paid out of the Treasury except as authorized by statute. U.S. Const. Art. I, § 9, Cl. 7. This Court has held that the Appropriations Clause prohibits reliance on principles of estoppel to require payments from the Treasury, based on the statements of government employees, when an Act of Congress does not authorize the payments. See *OPM* v. *Richmond*, 496 U.S. 414, 426-432 (1990). Similarly here, this Court's decisions establish

that the CFC has no authority to adjudicate a claim for money where Section 2501 bars the claim because of the six-year filing requirement, even if an individual government employee has failed to invoke the requirement as a basis for dismissal.[8]

3. Statutes of limitations are often applied by courts other than those of the sovereign that is responsible for the limitations period's enactment. Thus, a federal court sitting in diversity must apply the state limitations period that would govern if the suit were heard in state court, rather than a limitations period drawn from federal law. *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 107-110 (1945); see *Jinks* v. *Richland County*, 538 U.S. 456, 465 (2003); *Sun Oil Co.* v. *Wortman*, 486 U.S. 717, 726-727 (1988). Indeed, for most of our Nation's history,

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[8] As an additional protection for the federal fisc, Section 6 of the Tucker Act provided that, "should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; *but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.*" 24 Stat. 506 (emphasis added). Like the non-waivable six-year filing requirement contained in the Tucker Act and in the 1863 Act before it, that provision reflected Congress's unwillingness to allow individual federal attorneys to acquiesce in the payment of claims for which Congress had declined to waive the government's immunity. The substance of that provision remained in Title 28 until it was omitted by the 1948 Judicial Code revision. See 28 U.S.C. 763 (1946); *Munro*, 303 U.S. at 39 n.1. The House Report accompanying the 1948 revision explained that Section 763 was omitted because it had been superseded by, *inter alia*, Federal Rule of Civil Procedure 55(e). See H.R. Rep. No. 308, *supra*, at A239. Rule 55(e) continues to provide that "[n]o judgment by default shall be entered against the United States or an officer or agency thereof unless the claimant establishes a claim or right to relief by evidence satisfactory to the court." Fed. R. Civ. P. 55(e); see also Fed. Cl. R. 55(b).

state statutes of limitations were understood to apply of their own force (unless preempted by an inconsistent federal limitations period) even to federal causes of action adjudicated in federal court. See *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 159-162 (1987) (Scalia, J., concurring in the judgment). Conversely, when Congress establishes a limitations period for a federal cause of action, that period governs even if the federal claim is tried in state court. See, *e.g.*, *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 225 (1958); *Engel* v. *Davenport*, 271 U.S. 33, 39 (1926). In light of those potential applications, general treatment of limitations periods as jurisdictional would be anomalous, since one sovereign would not ordinarily assert the authority to regulate the jurisdiction of another sovereign's courts.

Section 2501 and its statutory predecessors, by contrast, have not been linked to particular substantive claims or to claims that might be brought in state court as well as federal court. Those provisions have instead governed proceedings that can be brought only against the United States and only in federal court—indeed, in a particular federal court. Section 2501 is therefore far more naturally characterized as jurisdictional than is a limitations period that has potential application in the courts of multiple sovereigns.

Just last Term, this Court observed that, as a general matter, "[j]urisdictional treatment of statutory time limits makes good sense." *Bowles* v. *Russell*, 127 S. Ct. 2360, 2365 (2007). The Court explained that, "[b]ecause Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them." *Ibid.* It noted as well that "the notion of subject-matter jurisdiction

obviously extends to classes of cases falling within a court's adjudicatory authority." *Ibid.* (ellipsis, internal quotation marks, and citation omitted). An appeal of an adverse federal-court judgment generally can be brought only to a single federal court. Time limits on appeals, like Section 2501 but unlike most statutes of limitations, therefore are readily construed as limitations on the jurisdiction of that single court, rather than as defenses that could be raised in state or federal court.[9]

The typical federal statute of limitations, which is not tied to a particular court and may apply in state judicial proceedings, is not naturally characterized as a limitation on the adjudicatory power of the court. The six-year filing requirement contained in Section 2501 and its predecessors, by contrast, has consistently been understood as a limitation on the class of suits against the United States that the Court of Claims (now CFC) may entertain. See, *e.g.*, *Wardwell*, 172 U.S. at 52 (describ-

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[9] A central tenet of our legal system is that a federal court should take special care to avoid deciding the merits of a case that Congress has not authorized it to adjudicate. The unauthorized exercise of jurisdiction is thus regarded as an error different in kind from a misapplication of law in the resolution of a case that the court *is* authorized to decide. See, *e.g.*, *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 101-102 (1998) ("For a court to pronounce upon the meaning or constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires."); *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 583 (1999). If excusing a party's noncompliance with a particular rule would place the court in the position of adjudicating a case that Congress did not authorize it to adjudicate, the rule is properly characterized as jurisdictional. Section 2501 establishes such a rule because it is a *statutory* provision that addresses the question whether the CFC may adjudicate a case against the Untied States *at all*.

ing the six-year time bar in the 1863 Act as "limiting the cases of which the Court of Claims can take cognizance"); *Kendall*, 107 U.S. at 125 (explaining that Congress "may restrict the jurisdiction of the Court of Claims to certain classes of demands," and that the six-year filing requirement is one of the statutory "restrictions which that court may not disregard").

C. The Text Of Current 28 U.S.C. 2501 Provides No Sound Basis For Departing From This Court's Consistent Holdings That Section 2501 And Its Predecessors Establish A Non-Waivable Jurisdictional Limit On The CFC's Authority

In its current form, 28 U.S.C. 2501 states that "[e]very claim of which the [CFC] has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." Petitioner contends that the "plain and unambiguous language" of current Section 2501 precludes treatment of the six-year filing requirement as a jurisdictional limit, because the wording of that provision assumes that even an untimely claim is a "claim of which the [CFC] *has jurisdiction*." Pet. Br. 13 (quoting 28 U.S.C. 2501); see *id.* at 13-18. That argument provides no sound basis for this Court to depart from its prior decisions treating Section 2501 and its predecessors as jurisdictional in character.

1. For purposes of the question presented here, the wording of current Section 2501 is not meaningfully different from the wording of the original version established by the 1863 Act. The 1863 Act provided "[t]hat every claim against the United States, cognizable by the court of claims, shall be forever barred unless the petition * * * be filed * * * within six years after the claim first accrues." § 10, 12 Stat. 767 (Rev. Stat. § 1069

(1878)); see p. 13, *supra*. The word "cognizable" "ordinarily means '[c]apable of being tried or examined before a designated tribunal; within [the] jurisdiction of [a] court or power given to [a] court to adjudicate [a] controversy.'" *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994) (quoting *Black's Law Dictionary* 259 (6th ed. 1990))). As used in the 1863 Act, the word "cognizable" was understood by this Court to refer to the classes of substantive claims that the Court of Claims was *potentially* empowered to adjudicate, provided that other jurisdictional prerequisites were satisfied in a particular case. The Court in *Finn* concluded that, because of the plaintiff's non-compliance with the six-year filing requirement, "the claim here in suit—although by reason of its character 'cognizable by the Court of Claims'—cannot properly be made the basis of a judgment in that court," and that "[t]he duty of the court, * * * whether limitation was pleaded or not, was to dismiss the petition." 123 U.S. at 231-232 (quoting 1863 Act § 10, 12 Stat. 767).

Thus, the Court in *Finn* saw no contradiction between its recognition that the plaintiff's claim, by its character, was "cognizable by the Court of Claims," and its conclusion that the six-year filing requirement in the 1863 Act constituted a non-waivable restriction on the Court of Claims' adjudicatory power. Similarly under the current version of the provision, the fact that petitioner's claim, by its character, is one "of which the [CFC] has jurisdiction," in the sense that the substantive claim is encompassed by an affirmative grant of jurisdiction to the CFC (28 U.S.C. 1491), does not negate the fact that Section 2501 continues to impose an *additional* non-waivable prerequisite to the CFC's authority to enter a money judgment against the United States. That inference is reinforced by the fact that the clause

"of which the [court] has jurisdiction" was first inserted by the 1948 Judicial Code revision. This Court has repeatedly recognized that "no change in law should be presumed from the 1948 revision of the Judicial Code 'unless an intent to make such changes is clearly expressed.'" *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 831 n.4 (1989) (quoting *Fourco Glass Co.* v. *Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957)); accord, *e.g.*, *Keene Corp.* v. *United States*, 508 U.S. 200, 209 (1993) (citing cases). Congress's substitution of the clause "of which the [CFC] has jurisdiction" for the prior synonymous phrase "cognizable by the court of claims" does not constitute the requisite clear expression of an intent to alter the provision's meaning, which had been fixed by a line of this Court's precedents.

Nor does the history of the 1948 Judicial Code revision suggest any intent to alter the established jurisdictional character of Section 2501's predecessors. The Chief Reviewer of the 1948 revision explained that, because the task necessarily involved the consolidation, simplification, and clarification of numerous enactments, "no changes of law or policy w[ere to] be presumed from changes of language in revision unless an intent to make such changes is clearly expressed. Mere changes in phraseology indicate no intent to work a change of meaning." William W. Barron, *The Judicial Code 1948 Revision*, 8 F.R.D. 439, 445-446 (1948). To that end, the Reviser's Notes to each section of the 1948 act "noted all instances where change [wa]s intended and the reason therefor." *Id.* at 446; see H.R. Rep. No. 308, *supra*, at A1. The Reviser's Notes to Section 2501 express no intent to supersede this Court's prior holdings as to the jurisdictional and non-waivable nature of the six-year time bar. See *id.* at A192. Consistent with the fact that

the current language of Section 2501 is synonymous with the text of former Rev. Stat. § 1069 (1878), and with the extrinsic evidence indicating that no substantive change was intended, this Court in *Soriano* reaffirmed the jurisdictional nature of Section 2501 even after the 1948 enactment. See 352 U.S. at 271.

2. Although petitioner purports to rely on the "plain and unambiguous language" of Section 2501 (Br. 13), nothing in the text of that provision suggests that the six-year filing requirement is waivable. To the contrary, Section 2501 states, with limited exceptions not relevant here, that "*[e]very claim* of which the [CFC] has jurisdiction *shall be barred* unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501 (emphases added). On its face, the statute categorically requires dismissal of claims filed more than six years after accrual (except for claims filed by "a person under legal disability or beyond the seas at the time the claim accrues," which are separately addressed in the third sentence of Section 2501, see note 1, *supra*), and it does not explicitly recognize any exception for suits in which the government fails to raise or preserve a challenge to the timeliness of the complaint.

Petitioner's core contention in this case—*i.e.*, that the court of appeals erred in considering the timeliness of its complaint after the government did not raise on appeal the argument that the complaint was filed more than six years after the claim's accrual—is not based on any language within the four corners of Section 2501 or its predecessors. Rather, petitioner's argument rests on background understandings of the manner in which statutes of limitations *generally* operate, and on Congress's assumed familiarity with those understandings. Thus, petitioner explains that limitations periods have histori-

cally been viewed as "non-jurisdictional and waivable," and argues that "[c]ongressional intent with respect to a statutory provision should be interpreted in light of the contemporary legal context." Br. 28; see *id.* at 28-29.

Petitioner is correct that this Court, in construing Section 2501's current language, should assume that the enacting Congress was familiar with the Court's prior decisions and with the existing legal landscape. See pp. 19-20, *supra*. Petitioner's own application of that principle, however, is unduly selective. While petitioner would impute to Congress an awareness of precedents holding that statutes of limitations *generally* establish waivable defenses, petitioner attaches no significance to the fact that Congress has refined, reenacted, and recodified Section 2501 and its predecessors against the backdrop of this Court's repeated pronouncements that the *specific* time limit at issue here—the six-year filing period for commencing suit against the United States in the Court of Claims (now the CFC)—*is not* subject to the general rule and *is* non-waivable and jurisdictional. There is no warrant for petitioner's approach. Both the plain text of Section 2501 standing alone, and the most directly relevant background principles and "legal context" (Pet. Br. 28), indicate that Section 2501's bar to claims filed more than six years after accrual is not subject to an exception for cases in which the government fails to preserve a timeliness objection.

D. Petitioner's Reliance On The Structure Of Title 28 Is Misplaced

Petitioner argues (Br. 19-24) that Section 2501 cannot properly be regarded as a jurisdictional limit on the CFC's authority because it is currently codified in a part

of Title 28 (Chapter 165) that is entitled "United States Court of Federal Claims Procedure" and that is separate from the indisputably jurisdictional provisions (most notably 28 U.S.C. 1491) that identify the substantive claims that the CFC is authorized to hear. Petitioner's reliance on the structure of Title 28 is misplaced.

1. As petitioner acknowledges (Br. 20), the 1948 Act that revised the Judicial Code expressly stated that "[n]o inference of a legislative construction is to be drawn by reason of the chapter in Title 28, Judiciary and Judicial Procedure, as set out in section 1 of this Act, in which any section is placed, nor by reason of the catchlines used in such title." Act of June 25, 1948, ch. 646, § 33, 62 Stat. 991. The *text* of the statute that effected the recodification of Title 28 thus forbids precisely the inference that petitioner asks this Court to draw. At the very most, the structure of Title 28 might suggest that the *revisers* did not understand the preexisting six-year filing requirement to be a limit on the Court of Claims' jurisdiction. If that is so, however, the revisers' view of preexisting law is entitled to no weight because it is manifestly contrary to the construction of Section 2501's predecessors reflected in this Court's pre-1948 decisions, which had consistently described the six-year filing requirement as a non-waivable jurisdictional rule.

2. Both in the 1863 Act and in its initial codification in Rev. Stat. § 1069 (1878), the six-year filing requirement was located in a separate section from the statutory provisions that specified the classes of substantive claims that the Court of Claims was authorized to adjudicate. See 1863 Act §§ 2, 3, 10, 12 Stat. 765, 767 (Rev. Stat. §§ 1059, 1060, 1069 (1878)). Neither the 1863 Act nor Rev. Stat. § 1069 (1878), moreover, explicitly described the six-year filing requirement as a limitation on

the Court of Claims' "jurisdiction." The structural features of current Title 28 on which petitioner relies thus do not meaningfully distinguish present law from the predecessor versions that this Court has repeatedly construed as non-waivable and jurisdictional. Petitioner's structural argument therefore provides no sound basis for this Court to revisit its prior holdings.[10]

3. Petitioner's structural argument is also inconsistent with this Court's recent decision in *Bowles*, which held that the timely filing of a notice of appeal in a federal civil case is a statutory prerequisite to the court of appeals' exercise of jurisdiction. See 127 S. Ct. at 2363-2366. The statutory provision at issue in *Bowles* (28 U.S.C. 2107(a)) does not contain the word "jurisdiction," and it is codified in a different chapter of Title 28 (Chapter 133, 28 U.S.C. 2101-2113) than are the provisions that in terms define the "jurisdiction" of the courts of appeals with respect to the types of cases they may hear (Chapter 83, 28 U.S.C. 1291-1296). In holding that Section 2107(a) nevertheless establishes a jurisdictional requirement, the Court noted its prior statement that "some time limits are jurisdictional even though ex-

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[10] As enacted in 1887, the Tucker Act's six-year filing requirement was contained within the same section that granted jurisdiction to the Court of Claims over specified classes of suits. § 1, 24 Stat. 505 ("[T]he Court of Claims shall have jurisdiction to hear and determine the following matters[] * * * *[p]rovided*, [t]hat no suit against the Government of the United States[] shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made."). Under the 1911 recodification of the Judicial Code, the two provisions were separated (as they had been under the 1863 Act and the Revised Statutes). See 1911 Act §§ 145, 156, 36 Stat. 1136, 1139. None of this Court's decisions have suggested that the waivability of the time bar turned on its placement relative to the applicable statutes' affirmative grants of jurisdiction.

pressed in a separate statutory section from jurisdictional grants." *Bowles*, 127 S. Ct. at 2364 (quoting *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 160 n.6 (2003)). Petitioner's structural argument cannot be reconciled with the analysis and result in *Bowles*.

E. This Court's Decisions Construing The Six-Year Filing Requirement As A Jurisdictional Limit On The Authority Of The Court of Claims Remain Good Law

Petitioner contends (Br. 33-37) that the longstanding precedents discussed above (see pp. 14-19, *supra*), which have construed the six-year filing requirement contained in Section 2501 and its predecessors as a non-waivable jurisdictional limit on the authority of the Court of Claims (now the CFC), have been superseded by this Court's more recent decisions. Petitioner views those more recent decisions as establishing a strong presumption that statutory time periods for filing suit against the government should in all respects be construed in the same way as analogous time periods governing disputes between private parties. Petitioner's reliance on those rulings is misplaced.

1. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court considered a statutory provision that required the plaintiff in an employment-discrimination suit against the federal government to file his complaint within 30 days of receipt of notice of final action taken by the Equal Employment Opportunity Commission. See *id.* at 92. While recognizing that the 30-day filing requirement was "a condition to the waiver of sovereign immunity and thus must be strictly construed," *id.* at 94, this Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to

suits against the United States," *id.* at 95-96. The Court stated that "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Id.* at 95.

This Court's decision in *Irwin* does not speak directly to the question presented here. The Court characterized its decision as adopting a "general rule to govern the applicability of equitable tolling in suits against the Government." 498 U.S. at 95. The Court did not purport to resolve other issues concerning the application of statutory time limits in suits against the government, and it did not discuss the question whether such limits are jurisdictional in nature.

Petitioner argues that, because courts are not authorized to fashion equitable exceptions to jurisdictional limits, the Court's endorsement of equitable tolling in *Irwin* necessarily (albeit implicitly) indicates that the time limit at issue there was non-jurisdictional. See Pet. Br. 36 (citing *Bowles*, 127 S. Ct. at 2366). Petitioner's effort to link the two concepts does not bolster its argument with respect to Section 2501, however, because this Court in *Kendall* squarely held that Section 2501's statutory predecessor was *not* subject to equitable tolling. That holding is an insuperable obstacle to petitioner's effort to draw support from *Irwin*.

The plaintiff in *Kendall* contended that the six-year period for filing suit under the 1863 Act should have been tolled during an interval when, by reason of his prior service to the Confederate government, he was disabled from swearing an oath that was a statutory prerequisite to filing suit in the Court of Claims. See 107 U.S. at 124-125. This Court rejected that argument, holding that the tolling provisions of the 1863 Act were exclusive, and that the Court could not "superadd to

those enumerated, a disability arising from the claimant's inability to truthfully take the required oath." *Id.* at 125. The Court noted that it could no more recognize an additional basis for tolling for the claimant in that case than it could for a "disability arising from sickness, surprise, or inevitable accident, which might prevent a claimant from suing within the time prescribed." *Ibid.* Accord *Soriano*, 352 U.S. at 273-274 (quoting the same language from *Kendall*).[11]

In *Irwin*, the Court concluded that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96.[12]

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[11] The 1863 Act stated:

> [T]he claims of married women first accrued during marriage, of persons under the age of twenty-one years first accruing during minority, and of idiots, lunatics, insane persons, and persons beyond seas at the time the claim accrued, entitled to the claim, shall not be barred if the petition be filed in the court or transmitted, as aforesaid, within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively.

§ 10, 12 Stat. 767. Section 2501 in its current form provides that "[a] petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases." 28 U.S.C. 2501; see note 1, *supra*.

[12] After announcing a rebuttable presumption that limitations periods in suits against the government are subject to equitable tolling, the Court in *Irwin* observed that "Congress, of course, may provide otherwise if it wishes to do so." 498 U.S. at 96. In its subsequent decisions in *United States* v. *Brockamp*, 519 U.S. 347, 350-354 (1997), and *United States* v. *Beggerly*, 524 U.S. 38, 48-49 (1998), the Court has construed particular federal statutes as precluding equitable tolling other than as specified on the face of the statute. As explained in the text, when *Irwin* was decided, this Court in *Soriano* and *Kendall* had

Even assuming that *Irwin* implicitly suggests a similar "rebuttable presumption" that limitations periods in suits against the United States are non-jurisdictional, that presumption is rebutted here—both by this Court's holdings in *Soriano* and *Kendall* specifically concerning Section 2501 and its predecessor, and by the Court's reasoning in those cases, which relied on the provision for tolling the limitations period in the case of certain disabilities as foreclosing tolling for other reasons. The fact that Congress has repeatedly refined Section 2501 and its predecessors without disturbing this Court's understanding of the six-year filing requirement as non-waivable and jurisdictional, and without disturbing the Court's rejection of equitable tolling under those provisions except where expressly provided, confirms that conclusion.[13]

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already construed Section 2501 and its predecessor not to allow equitable tolling.

[13] As petitioner observes (Br. 33-34), the Court in *Irwin* expressed the view that statutory text such as that contained in Section 2501's *first* sentence does not by itself manifest a sufficiently clear intent to preclude equitable tolling so as to rebut the presumption that tolling would be permitted. But the Court in *Irwin* did not discuss the *third* sentence of that provision, on which the Court in *Kendall* and *Soriano* had also relied, and it did not announce the overruling of any of its precedents—a step that would have been necessary for the Court to hold either that the six-year filing requirement in Section 2501 could be tolled for reasons other than those specified or (in this case) that the untimeliness of a complaint filed in the CFC may be overlooked if the government fails to raise the point. But cf. *Irwin*, 498 U.S. at 98 (White, J., concurring in part and concurring in the judgment) (expressing the view that the Court had overruled *Soriano*). Petitioner's reliance on the *Irwin* Court's discussion of Section 2501 is in substantial tension with petitioner's effort (Br. 30) to dismiss as "[u]nfortunate dicta" this Court's repeated and considered statements that the six-year filing requirement for suits in the Court of Claims is

2. Petitioner's reliance (Pet. 12-13) on *Franconia Associates* v. *United States*, 536 U.S. 129 (2002), is also misplaced. The Court in *Franconia Associates* rejected the contention "that § 2501 creates a special accrual rule for suits against the United States." 536 U.S. at 145. Rather, the Court held, the determination of when a claim against the government "first accrues" within the meaning of Section 2501 is governed by the same accrual principles that would apply in a like suit between private parties. See *ibid.* But while the Court in *Franconia Associates* expressed the view that "limitations periods should *generally* apply to the Government 'in the same way that' they apply to private parties," *ibid.* (emphasis added) (quoting *Irwin*, 498 U.S. at 95), it did not announce a categorical rule to that effect, and it had no occasion to decide whether the statutory bar to an untimely claim may be waived if the government fails to assert it. Nor did the *Franconia* Court's construction of the term "first accrues" require the overruling of any of this Court's precedents.[14]

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non-waivable and jurisdictional. The suit in *Irwin* was not filed in the CFC, and Section 2501 was therefore inapplicable to the case. Indeed, the Court's determination that equitable tolling is presumptively available in suits against the government was ultimately unnecessary to the disposition even of *Irwin* itself, since the Court concluded that Irwin himself did not satisfy the criteria for tolling. See 498 U.S. at 96.

[14] Petitioner's reliance (Br. 35) on *Bowen* v. *City of New York*, 476 U.S. 467 (1986), is also misplaced. The Court in *City of New York* held that the 60-day limit for challenging benefit determinations under the Social Security Act, see 42 U.S.C. 405(g) (1982), was waivable and non-jurisdictional. See 476 U.S. at 478 & n.10. The Court limited its holding to Section 405(g), however, and did not announce any general rule or presumption concerning the waivability of other statutory time limits for commencing suit against the government. The Court also observed that Section 405(g) by its terms allows the plaintiff to "seek judicial

3. Petitioner's reliance (Br. 35) on *Scarborough* v. *Principi*, 541 U.S. 401 (2004), is also misplaced. The timing requirement at issue there, see *id.* at 405 (construing statutory provision governing timing and content of application for attorneys' fees by prevailing party in suit against the United States), did not pertain to the initiation of a lawsuit, but instead governed a subsidiary determination made by federal courts in cases that they were indisputably authorized to decide. As the Court in *Bowles* explained, *Scarborough* "concerned 'a mode of relief . . . ancillary to the judgment of a court' that already had plenary jurisdiction." 127 S. Ct. at 2365 (quoting *Scarborough*, 541 U.S. at 413). Because Section 2501 speaks to the question whether the CFC may adjudicate petitioner's claim at all, it is much more naturally characterized as a jurisdictional rule. See note 9, *supra*.[15]

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review within 60 days of the Secretary's final decision or 'within such further time as the Secretary may allow.'" *Id.* at 476 (quoting 28 U.S.C. 405(g) (1982)). Section 2501 of Title 28 contains no comparable language authorizing Executive Branch officials to extend the filing period.

[15] Petitioner contends (Br. 47-48) that, if the six-year limitations period prescribed by Section 2501 is not jurisdictional, the court of appeals was *precluded* from inquiring into the timeliness of petitioner's complaint when the government failed to raise the point on appeal. That is incorrect. As this Court recognized in *Day* v. *McDonough*, 547 U.S. 198, 205-206 (2006), the non-jurisdictional character of a typical statute of limitations means that a federal court has no *obligation* to consider timeliness issues sua sponte, but it does not foreclose the court from doing so. That is particularly true where, as here under Section 2501, the limitations period applies to a suit for money damages against the United States and therefore is a condition on the waiver of sovereign immunity. See note 5, *supra*. In this case, moreover, the court of appeals would otherwise have been required to decide a constitutional question, see, *e.g.*, *Peters* v. *Hobby*, 349 U.S. 331, 338 (1955), and an amicus curiae argued in the court of appeals that

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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petitioner's complaint was untimely (and petitioner responded to that argument in its Federal Circuit reply brief), see Pet. App. 13a-14a. If this Court concludes that the six-year filing requirement is non-jurisdictional and waivable, and that the court of appeals was not required to consider the issue when the government did not invoke the bar on appeal, it would be appropriate to remand the case to allow the Federal Circuit to determine whether to consider the matter.